IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR.

No. A-645 (73-559)

HECK'S, INC.,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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Petitioner respectfully requests that this Court grant rehearing of its order dated December 3, 1973, which

denied certiorari, and that this Court now grant certiorari.[1]

Rehearing is sought and warranted for two fundamental reasons. First, at the time Petitioner (herein called "Heck's") filed its petition for certiorari, it had been denied the right to intervene below. The petition alleged as errors both the denial of intervention as well as objections to the merits of the Court of Appeals' decision. Those objections are set forth as Items B and C of Footnote 1. Consequently, since Heck's was not a party below, this Court's consideration of its petition for certiorari presumably was limited to the question of the lower court's wrongful denial of intervention. That is, consideration of Heck's substantive objections would have been barred by jurisdictional factors. However, subsequent to this Court's order denying the writ, the lower court did on January 25, 1974, pursuant to Heck's motion for reconsideration, grant leave to intervene below. As Heck's is thus a party to the proceedings which gave rise to the substantive errors also protested in the

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[1] The petition for certiorari previously filed herein presented the following questions:

A. Whether a person must be granted intervention as of right in proceedings before an appellate court even after that court has issued a decision, when intervention is necessary to preserve interests which have been adversely affected by that decision and which cannot otherwise be protected.

B. Whether the Board possesses power to assess collateral or punitive relief and whether the appellate court exceeded its authority by enlarging the remedies chosen by the Board.

C. Whether a person, not present during the court's proceedings but who will be adversely affected by the appellate court's decision to enlarge or modify the Board's remedial order, must be given official notice of the Court's contemplated decision and allowed an opportunity to present his views before the Court's decision becomes effective.

certiorari petition, this Court now may and should grant rehearing with respect to such substantive errors.[2]

The second basis for rehearing is that the substantive question presented in the instant case is inextricably intertwined with those raised in another case, which arose out of the same initial relation, which is now pending before this Court on writ of certiorari. *National Labor Relations Board* v. *Food Store Employees Union, Local 347, Amalgamated Meat Cutters and Butcher Workmen of North America*, AFL-CIO, No. 73-370.[3] Both cases involve the power of the National Labor Relations Board to require an unsuccessful party in Board proceedings to reimburse a successful party for the latter's litigation and organizational expenses as part of a Board-imposed remedy to cure unfair labor practices. In *Food Store Employees* the Board declined to grant such a remedy, while maintaining that it had the power to do so; when the lower court reversed the Board with respect to its exercise of discrimination in failing to grant such relief,[4] the Board protested the court's lack of au-

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[2] Since intervention was permitted below, issues A and C, set forth in Footnote 1, which relate to a failure to grant such intervention, are no longer appropriate and are not urged in this petition for rehearing.

[3] Another case also pending before this Court, and which was filed subsequent to the petition for certiorari herein, but whose issues are similarly intertwined with that presented in the instant case is *Tiidee Products, Inc.* v. *NLRB, etc.* No. 73-1180 (petition for writ of certiorari before judgment, filed on January 31, 1974.

[4] The court below also may be read to suggest that the Board has the statutory power to grant, as a remedy to cure alleged unfair labor practices, wages and other benefits that had been sought from but which had never been agreed to by a charged Employer (A 12-14. Heck's petition for certiorari herein). It is Heck's view that such relief, which seems clearly to be barred by this Court's decision in *H. K. Porter* v. *N.L.R.B.*, 397 U.S. 99 (1970), is a product of the same analysis which lead the court below to grant the extraordinary relief involved here and in *Food Store Employees* and which lead

thority to alter the Board's chosen remedy. In this case, Heck's argues that the Board lacks the statutory right or power to grant such relief in the first instance.[5]

Thus, a decision in *Food Store Employees* that courts either do or do not have the challenged power to alter the Board's remedies will not dispose of the question of the Board's statutory warrant to order the challenged relief involved here. However, if the views of Heck's are sustained—that the Board has no such right or warrant—that would have an obvious and controlling impact on the question of the court's conduct below in compelling such relief. That is, the court could not reasonably reverse the Board for failing to order relief which the Board is statutorily precluded from granting. In this respect, the cases exert a necessary impact on one another and, in the interest of the fullest and most enlightening analysis of the area involved, should be considered and heard together.

Heck's does agree that the Board may ordinarily determine which *compensatory* remedies will effectuate the policies of the National Labor Relations Act and that courts should respect this determination. However, contrary to the Board's apparent contention in *Food Store Employees*, Heck's here claims that the Board does not have the statutory authority to impose a collateral or punitive remedy where Congress intended only compensatory or make-whole relief for individuals aggrieved by unfair labor practices. Thus, Heck's and the Board are asserting diametrically contrary views on the critical

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the Board to do so in *Tiidee Products, Inc.*, 176 NLRB 969. Each case presents an unwarranted enlargement of the Board's statutory power.

[5] See the petition for certiorari before judgment in *Tiidee, supra*, No. 73-1180 which similarly argues that the Board lacks such statutory authority.

issue of the scope of the Board's statutory remedial powers.

It is manifest that the question of the statutory limits of the Board's remedial power will continue to be of critical importance to all parties before the Board. The recently filed petition for certiorari in *Tiidee Products, Inc., supra,* is further evidence of that fact and of the need for a resolution of questions beyond the issues formulated by the Board in *Food Store Employees.* The resolution of the latter without consideration of the former would not well serve the objective to secure the most rational and thorough evaluation of the important issue of the scope of the Board's remedial powers.

CONCLUSION

For the reasons set forth in this petition for rehearing as well as in the petition for certiorari previously filed, rehearing and certiorari should now be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

By /s/ Burt A. Braverman
Burt A Braverman